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No. 07-1608

In the Supreme Court of the United States

ANDRE SEYMOUR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), prohibits imposition of an enhanced sentence based on drug quantity for conspiracy to possess a controlled substance with intent to distribute it, in violation of 21 U.S.C. 846, unless the jury finds beyond a reasonable doubt the amount of drugs attributable to the defendant himself, as opposed to the conspiracy as a whole.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 519 F.3d 700. The opinion of the district court (Pet. App. 32a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2008. The petition for a writ of certiorari was filed on June 23, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners Kent Clark, Andre Lawrence, Troy Lawrence, Andre Seymour, Artrez Nyroby Seymour, and Stacia Smith were convicted of various drug and firearms charges,

including conspiracy to distribute and to possess with intent to distribute 50 grams or more of crack cocaine within 1000 feet of an elementary school, in violation of 21 U.S.C. 846. The district court sentenced petitioners to the following terms of imprisonment for the conspiracy convictions: 300 months for Clark; 300 months for Andre Lawrence; life imprisonment for Troy Lawrence; 324 months for Andre Seymour; 300 months for Artrez Seymour; and 133 months for Smith. The district court also sentenced Troy Lawrence to concurrent terms of life imprisonment for five additional drug convictions. The court of appeals affirmed petitioners' sentences. Pet. App. 1a-31a, 42a, 57a, 71a, 84a, 96a, 109a.

1. Petitioners were long-standing members of a crack trafficking organization (the Organization) that operated in Chicago Heights, Illinois, between the early 1990s and March 2002. Initially, the Organization sold crack at Wentworth Gardens. In the late 1990s, when the buildings around Wentworth Gardens were condemned, the Organization moved to the Claude Court area of Chicago Heights, which was located less than 1000 feet from an elementary school. Pet. App. 3a, 20a.

The Organization had essentially the same structure at both Wentworth Gardens and Claude Court. Troy Lawrence was responsible for buying powder cocaine from one of his suppliers. He stored the cocaine and had it cooked into crack at various stash houses, which were residences of members of the Organization. Once the crack was prepared, members of the Organization referred to as "baggers" packaged the crack into small plastic bags, 50 of which would be placed into a bigger plastic bag, which was referred to as a "fifty pack." Pet. App. 3a-4a.

After the crack was packaged, a member of the Organization referred to as a "runner" brought it to the sales area. The runner also picked up drug sale proceeds from the sales area. The runner usually provided the crack to a member of the Organization referred to as a "shift supervisor" and also picked up drug proceeds from the shift supervisor. The shift supervisor was the manager of the sales area. If the area was running low on crack, the shift supervisor called other members of the Organization to get more. After receiving the drugs, the shift supervisor provided the crack to a member of the Organization referred to as a "packman," who was responsible for directly selling the crack to customers. Shift supervisors were thus aware of the amount of crack going into the sales area and to each packman. Pet. App. 4a, 21a.

The Organization also assigned members to security. Those members monitored the drug sales area, watching for law enforcement or anyone who might try to rob an Organization member. Organization members carried guns for protection and drove cars with hidden compartments for concealing guns and drugs. Pet. App. 4a.

Troy Lawrence was the leader of the Organization from its inception in the early 1990s until his arrest in 2002. He purchased most of the cocaine from the Organization's suppliers, directed the operation of the stash houses and the daily shifts at the sales areas, held meetings to discuss the operations with other members of the Organization, controlled the amount of money each member was paid and whether members moved up in the Organization, and made decisions about who was disciplined and how. Pet. App. 11a.

Kent Clark worked for the Organization from 1996 until his arrest in January of 2002. Clark was a shift

supervisor at Wentworth Gardens. At Claude Court, Clark collected drug proceeds and transported money for the Organization. Pet. App. 11a.

Andre Lawrence worked for the Organization from at least 1999 until 2002. He received cocaine from an Organization supplier, transported and bagged crack, and operated a stash house in his home. On one occasion, he gave another member a huge piece of crack, either softball-sized or football-sized, to be bagged. On another occasion, law enforcement intercepted a phone call in which an Organization member was talking to Troy Lawrence about picking up a "big mac," which is approximately 500 grams of crack, from Andre Lawrence's house. Pet. App. 13a.

Andre Seymour worked as a shift supervisor for approximately two years at the Claude Court drug sales location. He received drugs, handled drug proceeds, bagged crack at the stash houses, participated in Organizational beatings to enforce discipline, attended Organization meetings, and obtained a gun for the Organization. Pet. App. 12a.

Artrez Seymour worked for the Organization from 1998 until at least 2001. At both Wentworth Gardens and Claude Court, he worked as a packman and as security. On July 5, 2000, police officers seized 44 small plastic bags containing crack that he had dumped as he ran from the officers. Pet. App. 7a, 12a.

Stacia Smith, who was Troy Lawrence's girlfriend, "worked for the Organization for an uncertain but undoubtedly long period of time." Pet. App. 12a. She was a runner at both Wentworth Gardens and Claude Court and operated a stash house at her residence, where members of the Organization frequently bagged crack. One Organization member saw Smith deliver drugs or

pick up money approximately 100 times at Wentworth Gardens and approximately 20 to 30 times at Claude Court. Another member reported that Smith delivered drugs twice a week at Wentworth Gardens. In a phone call intercepted by law enforcement, Troy Lawrence directed Smith to deliver $4000 worth of crack, or roughly 100 grams, to another Organization member. *Ibid.*

The Organization handled large amounts of both powder and crack cocaine. For example, one of the Organization's cocaine suppliers, Mark Connor, stated that he sold powder and crack cocaine to petitioner Troy Lawrence on numerous occasions between 1997 and 2002. Initially, Connor sold Troy approximately 4.5 ounces of cocaine once or twice a week for conversion into crack. Over time, the drug deals increased in size, including deals for between one and three kilograms of cocaine. Pet. App. 5a.

The Organization sold crack 24 hours a day, seven days a week, and employed approximately 10 to 15 people. Levert Griffin, a runner, estimated that he delivered $4000 to $10,000 worth of cocaine in a single eight-hour shift Darren Stewart, an Organization member since 1996, who worked as a packman from 1997 to 1999, estimated that the Organization sold about $20,000 of crack each day. Pet. App. 6a, 10a-11a, 19a, 20a.

At various times, law enforcement agents seized drugs, drug proceeds, and firearms from Organization members. For example, on December 26, 2001, agents discovered a gun and 10.9 grams of crack in a hidden compartment in Griffin's car. When agents searched Organization member Tasha Deere's vehicle on January 24, 2002, they discovered 227 grams of crack in a similar compartment. On January 27, 2002, agents seized 211 grams of crack from the vehicle of Organization member

Cameron Wilson. On February 5, 2002, during a police chase, an Organization supplier dumped 4.4 kilograms of powder cocaine out the window of his vehicle. On March 5, 2002, in a search of Troy Lawrence's home, agents discovered over $171,000 in cash as well as firearms. In a search of petitioner Andre Lawrence's home, agents found thousands of dollars in cash, two loaded guns, ammunition, and drug paraphernalia. In a search of two other stash houses, officers discovered 297.8 grams of crack and 496.4 grams of powder cocaine. Pet. App. 8a-9a; Gov't C.A. Br. 21-24.

In addition, between April and June of 2001, undercover law enforcement officers made seven controlled purchases of crack, totaling 172.2 grams, in the Claude Court drug sales area. Pet. App. 10a.

2. On July 16, 2002, a grand jury in the United States District Court for the Northern District of Illinois returned a 40-count indictment charging petitioners and 20 other individuals with drug and firearms offenses based on the Organization's activities. Count 1 charged each petitioner with conspiring to distribute and to possess with intent to distribute in excess of five kilograms of cocaine and in excess of 50 grams of cocaine base (*i.e.*, crack) within 1000 feet of an elementary school, in violation of 21 U.S.C. 846. Indictment 1-8. The indictment also charged several petitioners with other drug or firearms offenses. In particular, Troy Lawrence was charged with four counts of possessing crack cocaine with the intent to distribute it and one count of attempting to possess crack cocaine with the intent to distribute it, all in violation of 21 U.S.C. 841(a)(1). Indictment 24, 31, 42, 44-45.

On June 25, 2003, the government filed informations against five of the petitioners—Kent Clark, Andre Law-

rence, Troy Lawrence, Andre Seymour, and Artrez Seymour—giving notice of its intent to seek enhanced statutory penalties based on their prior felony drug convictions. See 21 U.S.C. 851. The government stated that petitioners Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour each had one prior felony drug conviction and petitioner Troy Lawrence had more than two prior felony drug convictions. See Gov't C.A. Br. 5. Consequently, the government stated, under 21 U.S.C. 841(b)(1)(A), Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour each faced a statutory maximum sentence for the drug conspiracy charge of life imprisonment, and Troy Lawrence faced a mandatory sentence of life imprisonment. See Gov't C.A. Br. 5-6.

On December 18, 2003, a jury found all six petitioners guilty of the drug conspiracy charge. The jury specifically found that the object of the conspiracy was to distribute or to possess with intent to distribute 50 grams or more of cocaine base (*i.e.*, crack). Verdict 1-2. The jury also found several petitioners guilty of other drug or firearms charges. As relevant here, the jury found Troy Lawrence guilty of the five substantive crack charges. *Id.* at 3-9. For one of those charges, the jury expressly found that the amount of crack involved was 50 grams or more. *Id.* at 5; see Gov't C.A. Br. 6.

Petitioners filed numerous post-trial motions, which the district court denied. In particular, petitioners Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour filed a "Motion For Sentencing Under 21 U.S.C. 841(b)(1)(C)," which applies to drug offenses involving any amount of controlled substances. They argued that, in sentencing them for the crack conspiracy, the district court could not impose the enhanced statutory penalties based on drug quantities set forth in 21

U.S.C. 841(b)(1) because the jury failed to make specific findings of the amount of crack that each defendant could reasonably have foreseen would be involved in the conspiracy. See Gov't C.A. Br. 6-7. On September 8, 2005, the district court issued a written opinion denying that motion. Pet. App. 32a-37a. The court ruled that, "in order for the enhanced maximum penalties found in subparagraphs (A) and (B) of 841(b)(1) to apply, the jury need not make defendant-specific findings, but rather need only find the amount and type of drugs that were involved in the conspiracy charged—exactly what was done in this case." *Id.* at 36a. The court also noted that each petitioner faced potentially higher punishments because of his prior drug felony conviction. *Id.* at 37a.

Petitioners were sentenced to the following terms of imprisonment for their conspiracy convictions: (1) 300 months for Kent Clark (Pet. App. 71a); (2) 300 months for Andre Lawrence (*id.* at 109a); (3) 324 months for Andre Seymour (*id.* at 57a); (4) 300 months for Artrez Seymour (*id.* at 96a); (5) 133 months for Stacia Smith (*id.* at 84a); and (6) life imprisonment for Troy Lawrence (*id.* at 42a). Troy Lawrence was also sentenced to an additional term of life imprisonment on each of the substantive drug convictions. *Ibid.*

3. The court of appeals affirmed petitioners' sentences. Pet. App. 1a-31a. As relevant here, the court rejected their argument that, under the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), a defendant who has been convicted of a drug conspiracy under 21 U.S.C. 846 can be subjected to the enhanced statutory penalties based on drug quantity set forth in 21 U.S.C. 841(b)(1)(A) only if the jury has made a "defendant-specific drug quantity determination." Pet. App. 18a. The court explained:

> Once a jury has determined that a conspiracy involved a type and quantity of drugs, and has found a particular defendant guilty of participating in the conspiracy, the jury has established the statutory maximum sentence that any one participant in the conspiracy may receive. See [*United States* v.] *Knight*, 342 F.3d [697,] 710 [(7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004)]. Once the drug quantity and type for the conspiracy as a whole are determined by the jury, the judge may lawfully determine the drug quantity attributable to each defendant and sentence him accordingly so long as that determination does not exceed the statutory maximum sentence determined by the jury. *Id.* * * * "The rule, then, is that the government need only allege and prove to the jury the bare facts necessary to increase the statutory sentencing maximum for the conspiracy as a whole." *Id.*; see *Edwards* v. *United States*, 523 U.S. 511, 513-[5]14 (1998).

Ibid.

In addition, the court of appeals rejected petitioners' arguments that the district court had erred in attributing 1.5 kilograms or more of crack to each of them for sentencing purposes. Pet. App. 18a-20a. After reviewing the extensive evidence demonstrating that the Organization was a "massive drug trafficking operation," the court of appeals concluded that "an individual need not be involved in the Organization for more than a couple of weeks to be a part of 1.5 kilograms of crack sales." *Id.* at 20a. The court noted that the evidence demonstrated that petitioners all played "critical roles" and had "long tenures" in the Organization. *Ibid.* Accordingly, the court held that "[t]here was overwhelming

evidence" that "each of them could easily foresee that the conspiracy involved 1.5 or more kilograms of cocaine base." *Id.* at 22a.

ARGUMENT

Petitioners contend (Pet. 7-26) that their Sixth Amendment rights were violated because they were exposed to an enhanced statutory maximum sentence under 21 U.S.C. 841(b) for their crack conspiracy convictions based on the jury's finding of the amount of drugs involved in the conspiracy as a whole, rather than the amount of drugs reasonably foreseeable to each particular petitioner. They further contend that the decision of the court of appeals conflicts with decisions of other circuits. Petitioners' claim does not warrant this Court's review.

The court of appeals correctly held that the statutory maximum sentence under Section 841(b) is determined by a jury's finding of the amount of drugs involved in the conspiracy as a whole. Furthermore, this case is an inappropriate vehicle for resolution of any conflict among the courts of appeals because petitioners would not be entitled to any relief even if they were correct that a defendant-specific finding of drug quantity is required. Five petitioners received sentences below the applicable statutory maximum for offenses involving any quantity of cocaine. The remaining petitioner's overall sentence would also not be affected by reversal of his sentence for the conspiracy offense because he is subject to life sentences on five other counts of conviction. Moreover, any failure to make a defendant-specific drug quantity finding was harmless because there was overwhelming evidence that each petitioner could reasonably have foreseen that the conspiracy would involve far more than the

50 grams of crack necessary to trigger a maximum sentence of life imprisonment.

1. Petitioners argue (Pet. 7-26) that their sentences violated the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because, in their view, *Apprendi* requires that the statutory maximum penalty for each defendant convicted of a drug conspiracy under 21 U.S.C. 846 be based on a jury's finding of the amount of drugs reasonably foreseeable to that defendant rather than the amount of drugs involved in the conspiracy as a whole. The court of appeals correctly rejected that argument.

In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. A drug conspiracy is subject to the graduated penalties set forth in 21 U.S.C. 841(b). Under 21 U.S.C. 841(b)(1)(C), the statutory maximum penalty for a drug offense involving any amount of cocaine is 20 years, or 30 years if the defendant has a prior drug felony conviction. Under 21 U.S.C. 841(b)(1)(A), the statutory maximum increases to life imprisonment if the offense involves 50 grams or more of cocaine base.

As the court of appeals correctly held, the facts (other than a prior conviction) that establish the statutory maximum for a drug conspiracy (and that must be found by the jury beyond a reasonable doubt) are the type and amount of drugs involved in the conspiracy. Pet. App. 15a-18a. "Once the drug quantity and type for the conspiracy as a whole are determined by the jury, the judge may lawfully determine the drug quantity attributable to each defendant and sentence him accordingly" so long as the sentence falls within the statutory maximum

made applicable by the jury's conspiracy-wide drug quantity determination. *Id.* at 18a (citing *United States* v. *Knight*, 342 F.3d 697, 710 (7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004)); accord *United States* v. *Stiger*, 413 F.3d 1185, 1192 (10th Cir.), cert. denied, 546 U.S. 1049 (2005); *United States* v. *Phillips*, 349 F.3d 138, 142-143 (3d Cir. 2003), vacated on other grounds by *Barbour* v. *United States*, 543 U.S. 1102 (2005); *United States* v. *Turner*, 319 F.3d 716, 722-723 (5th Cir.), cert. denied, 538 U.S. 1017 (2003); *Derman* v. *United States*, 298 F.3d 34, 43 (1st Cir.), cert. denied, 537 U.S. 1048 (2002).[1]

As the court of appeals explained, the jury in this case returned a special verdict finding that the conspiracy involved 50 grams or more of crack. Pet. App. 17a; Verdict 1-2. That finding authorized a statutory maximum penalty of life imprisonment for each petitioner, because the jury found each of them guilty of participating in the conspiracy. See Pet. App. 16a-17a; 18 U.S.C. 841(b)(1)(A), 846. "The district court judge's determinations regarding the drug quantity attributable to each [petitioner] did not increase the penalty for the crime beyond the statutory maximum, as determined by the jury, of life imprisonment." Pet. App. 17a. Thus, "[t]here was no *Apprendi* error." *Ibid.*

Petitioners' argument that the statutory maximum for each defendant must be determined by a jury's finding of the amount of drugs reasonably foreseeable to that particular defendant is contrary to the plain language of the drug statutes. The drug conspiracy statute

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[1] Although petitioner suggests (Pet. 18 n.3) that the First Circuit retreated from its holding in *Derman* in *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003), that is not correct. *Nelson-Rodriguez* reaffirms that *Derman* is the law of the First Circuit. 319 F.3d at 46-47.

states that conspirators "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." 21 U.S.C. 846. Under 21 U.S.C. 841(b), the maximum penalties for drug offenses turn on the type and amount of drugs "involv[ed]" in the "violation." 21 U.S.C. 841(b)(1)(A). The statutes thus make clear that the statutory maximum depends on the type and amount of drugs involved in the conspiracy. No language in either statute suggests that the statutory maximum varies depending on the amount of drugs "reasonably foreseeable" to each individual conspirator.

Edwards v. *United States*, 523 U.S. 511 (1998), supports the court of appeals' conclusion that the statutory maximum for a drug conspiracy is determined based on the drug type and quantity involved in the conspiracy as a whole. As the First Circuit explained in *Derman*, in *Edwards*, this Court held that "as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum *applicable to that conspiracy*, the court may 'determine both the amount and the kind of "controlled substances" for which the defendant should be held accountable—and then . . . impose a sentence that varies depending upon amount and kind.'" *Derman*, 298 F.3d at 42 (brackets omitted) (quoting *Edwards*, 523 U.S. at 513-514); see *Edwards*, 523 U.S. at 515 (noting that the petitioners' sentences did not exceed "the maximum that the statutes permit for a cocaine-only conspiracy").

As the First Circuit further explained, *Apprendi* "did not purport to overrule *Edwards*." *Derman*, 298 F.3d at 42. Instead, the two decisions are "easily harmonized." *Ibid.* "[I]n a drug conspiracy case, the jury

should determine the existence vel non of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine at sentencing, the particulars regarding the involvement of each participant in the conspiracy. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly" within the applicable statutory maximum set by "the jury's conspiracy-wide drug quantity determination." *Id.* at 42-43.

United States v. *Cotton*, 535 U.S. 625 (2002), also supports the decision below. In *Cotton*, this Court held that the imposition of life sentences on defendants convicted of conspiracy under 21 U.S.C. 846 was not plain error, even though the amount was not alleged in the indictment or found by the jury, because "overwhelming" and "essentially uncontroverted" evidence showed that "the conspiracy involved at least 50 grams of cocaine base." 535 U.S. at 633. The Court's analysis focused on the drug quantity involved in the conspiracy as a whole. Three separate times the Court referred to the fact that "the *conspiracy* involved at least 50 grams of cocaine base." *Ibid.* (emphasis added); see *ibid.* (evidence "revealed the *conspiracy's* involvement with far more than 50 grams of cocaine base") (emphasis added). Nothing in the Court's reasoning suggested that the statutory maximum for the conspiracy would vary depending on the quantity of cocaine base attributable to each defendant. On the contrary, the Court stated that

"the relevant quantity for purposes of *Apprendi*" was the amount of cocaine "that the conspiracy involved." *Id.* at 633 n.3.

2. Petitioners argue (Pet. 12-21) that this Court's review is warranted because the court of appeals' ruling conflicts with decisions of other courts of appeals. Although there is disagreement among the courts of appeals, petitioners overstate the extent of the conflict. And this case is not an appropriate vehicle to resolve the disagreement among the courts of appeals that does exist.

a. As petitioners note, the decision below conflicts with *United States* v. *Collins*, 415 F.3d 304 (4th Cir. 2005). In *Collins*, the Fourth Circuit held that, in order to impose the enhanced statutory maximums in 21 U.S.C. 841(b) on a defendant convicted of a drug conspiracy, a jury must determine the quantity of drugs attributable to that particular defendant based on the coconspirator liability principles set forth in *Pinkerton* v. *United States*, 328 U.S. 640 (1946). See *Collins*, 415 F.3d at 313-314.[2]

The ruling in *Collins* is incorrect. The court in *Collins* did not examine the language of the drug statutes, nor discuss the well-reasoned, contrary decisions of other courts of appeals. Nor did the court adequately explain why *Pinkerton* principles should apply in determining the penalty for conviction of a drug conspiracy. *Pinkerton* provides that a defendant is substantively liable for the reasonably foreseeable criminal acts of a coconspirator. Accordingly, as the *Collins* court itself

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[2] The Fourth Circuit has applied *Collins* in subsequent cases. See *United States* v. *Brooks*, 524 F.3d 549, 557-558 (2008); *United States* v. *Foster*, 507 F.3d 233, 250 (2007), cert. denied, 128 S. Ct. 1690 (2008); *United States* v. *Munson*, 181 Fed. Appx. 368, 369 (2006).

stated, "*Pinkerton* principles are relevant when a conspirator is charged with a substantive offense arising from the actions of a coconspirator, not when a conspirator is charged with conspiracy." 415 F.3d at 313.

The other cases identified by petitioner (Pet. 14-15, 17 n.2) do not conflict with the decision below. In the cases from the Second Circuit, there was neither a jury finding nor an admission by the defendant of the amount and type of drugs involved in the conspiracy as a whole. See *United States* v. *Adams*, 448 F.3d 492, 499 (2d Cir. 2006) (defendant did not admit to drug quantity or type in connection with his guilty plea but was sentenced as if he had participated in a conspiracy involving five kilograms of cocaine); *United States* v. *Gonzalez*, 420 F.3d 111, 132-133 (2d Cir. 2005) (defendant did not admit to drug quantity in connection with his guilty plea but was sentenced as if he had participated in a conspiracy involving 50 grams or more of crack). In this case, in contrast, the jury made a specific finding that the conspiracy involved 50 grams or more of crack.

Nor is there any conflict between the decision below and *United States* v. *Graham*, 317 F.3d 262, 273-274 (D.C. Cir. 2003). In that case, the issue of whether a jury must make defendant-specific drug quantity determinations in a conspiracy case in order to set the statutory maximum sentence was neither raised nor discussed. And the question of drug quantity appears not to have been submitted to the jury at all. See *id.* at 273.

Although petitioners do not cite *United States* v. *Banuelos*, 322 F.3d 700 (9th Cir. 2003), that decision is in tension (although not actual conflict) with the decision below. In *Banuelos*, the Ninth Circuit held that, when a defendant pleads guilty to a drug conspiracy, *Apprendi* requires the district court to determine beyond a rea-

sonable doubt the quantity of drugs attributable or reasonably foreseeable to the defendant in order to subject him to the enhanced statutory penalties in 21 U.S.C. 841(b)(1). See 322 F.3d at 704.

b. Although there is a conflict between the decision below and decisions of the Fourth Circuit, this case is not an appropriate vehicle to resolve that disagreement. Petitioners would not be entitled to any relief even if the Fourth Circuit's rule were correct.

Even under the Fourth Circuit's rule, five of the petitioners did not suffer any *Apprendi* violation. Four of the petitioners—Kent Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour—each had a prior felony drug conviction. See Clark Presentence Investigation Report (PSR) 10; Andre Lawrence PSR 18; Andre Seymour PSR 8; Artrez Seymour PSR 14. Those four petitioners were therefore subject to a statutory maximum penalty for their conspiracy convictions of 30 years of imprisonment, regardless of the amount of crack for which they were held accountable. See 21 U.S.C. 841(b)(1)(C). And each of those petitioners received a sentence of less than 30 years for his conspiracy conviction. See p. 8, *supra*. Petitioner Stacia Smith was subject to a 20-year statutory maximum for her conspiracy conviction, regardless of the amount of crack for which she was held accountable, see 21 U.S.C. 841(b)(1)(C), and she received a sentence of only 11 years and one month of imprisonment for that conviction. See p. 8, *supra*. Accordingly, none of those five petitioners would have a viable *Apprendi* claim even under the Fourth Circuit's rule. Cf. *United States* v. *Brooks*, 524 F.3d 549, 556 n.13 (4th Cir. 2008) (any error would be harmless where defendants were sentenced within the default

statutory maximum for drug offenses provided in 21 U.S.C. 841(b)(1)(C)).

In an effort to avoid that conclusion, petitioners argue that *Apprendi* is violated whenever a judge finds any facts "which could *theoretically* change a defendant's *potential* maximum exposure." Pet. 8 (emphasis added). In support of that proposition, petitioners cite (see Pet. 8-11) isolated statements from this Court's cases, but none of the holdings of those cases supports petitioners' argument. See *Cunningham* v. *California*, 127 S. Ct. 856 (2007) (invalidating California's determinate sentencing scheme in a case in which the judge imposed a 16-year sentence and the jury's verdict authorized a sentence of only 12 years); *United States* v. *Booker*, 543 U.S. 220, 236, 245 (2005) (invalidating mandatory federal sentencing guidelines in two cases in which the sentencing judge had imposed a sentence greater than the sentence authorized based on the jury's findings); *Blakely* v. *Washington*, 542 U.S. 296 (2004) (invalidating Washington's determinate sentencing scheme where the sentencing judge had imposed a sentence greater than the sentenced authorized by the jury's verdict alone).

Indeed, in the same cases relied on by petitioners, this Court reaffirmed that the Sixth Amendment right established by *Apprendi* is that a judge may not "*impose* a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Cunningham*, 127 S. Ct. at 860 (emphasis added); see *Booker*, 543 U.S. at 245 (the "Sixth Amendment is violated by the *imposition* of an enhanced sentence under the United States Sentencing Guidelines" based on judge-found facts not found by the jury or admitted by defendant) (citation omitted;

emphasis added); see also, *e.g.*, *United States* v. *Sanchez*, 269 F.3d 1250, 1279 (11th Cir. 2001) (en banc) (no *Apprendi* violation "unless the actual sentence ultimately imposed exceeds the catchall maximum penalty in § 841(b)(1)(C)"), cert. denied, 535 U.S. 942 (2002).

Petitioner Troy Lawrence, who received a sentence of life imprisonment for his conspiracy conviction, is the only petitioner whose sentence exceeds the default statutory maximum provided by Section 841(b)(1)(C). Even he, however, would not be entitled to any reduction in his overall sentence under the Fourth Circuit's rule, because he received life sentences on five other charges. See p. 8, *supra*. Moreover, one of his life sentences was for possessing 50 grams or more of crack with intent to distribute it. Verdict 5. Although that drug transaction was not specifically detailed in the conspiracy allegations in the indictment, the evidence at trial overwhelmingly established that the transaction was part of the conspiracy. Accordingly, the jury's specific quantity finding on the crack distribution charge demonstrates that any error in failing to secure a defendant-specific drug quantity determination on the conspiracy count was harmless. See Pet. App. 21a.

Moreover, the evidence was overwhelming that all six petitioners—particularly Troy Lawrence, who was the leader of the Organization and directed its day-to-day operations—could reasonably have foreseen that the conspiracy would involve 50 grams or more of crack. See Pet. App. 19a-22a. Indeed, as the court of appeals observed, "[t]here was overwhelming evidence at trial that demonstrated the day-to-day involvement over extended periods of time of the [petitioners], such that each of them could *easily foresee* that the conspiracy involved *1.5 or more kilograms*" of crack. *Id.* at 22a

(emphasis added). Accordingly, any error in failing to secure a jury finding on the drug quantity foreseeable to each defendant was harmless beyond a reasonable doubt, and petitioners are not entitled to any relief. See *Neder* v. *United States*, 527 U.S. 1, 10-11 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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